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No. 85-1592

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

THOMAS BURKE, et al.,

Petitioners,

v.

MASSACHUSETTS ASSOCIATION OF
AFRO-AMERICAN POLICE, INC., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF STATE RESPONDENT-APPELLEE IN OPPOSITION

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QUESTION PRESENTED

Whether this Court's opinion in Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984), effected such a clear change in Title VII law that a trial judge abused his discretion by denying non-minorities intervention to contest an affirmative action consent decree in federal district court.

PARTIES

This Brief in Opposition is submitted on behalf of the State Respondent-Appellee, the Department of Personnel Administration of the Commonwealth of Massachusetts.

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OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit (Pet. A1-A8) is reported at 780 F.2d 5 (1st Cir. 1985). The opinion of the District Court (Pet. A9-A19) is reported at 106 F.R.D. 80 (D. Mass. 1985).

JURISDICTION

The judgment of the Court of Appeals affirming the order of the District Court was entered on December 20, 1985. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case presents a question of the correct interpretation of the remedial provisions of Title VII of the Civil Rights Act of 1964, § 706(g), as amended, 42 U.S.C. § 2000e-5(g) ("Section 706(g)"), reproduced in the petition for certiorari at A22-A24.

STATEMENT OF THE CASE

Petitioners, officers in the Boston Police Department, moved to intervene in the District Court for the express pur-

pose of vacating a consent decree entered in 1980 in Massachusetts Association of Afro-American Police, et al. v. Boston Police Department, et al., C.A. No. 78-529-Mc (D. Mass.). The purpose of the consent decree is to insure the implementation of an affirmative action plan for promoting minority police officers to the rank of sergeant in the Boston Police Department after the administration of a civil service promotional examination, the contents of which are demonstrably free of racial bias.

On March 2, 1978, plaintiff Massachusetts Association of Afro-American Police, Inc. ("MAAAP") commenced this action alleging a pattern of discrimination in the promotional practices of the Boston Police Department in violation of the Civil Rights Act of 1871, 42 U.S.C.

§ 1983, the Civil Rights Act of 1870, 42 U.S.C. § 1982, Titles VI and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000 et seq., and provisions of the laws and Constitution of the Commonwealth of Massachusetts. (Opposition of Co-respondents ("Opp.") A21-A45). After more than two years of discovery and negotiations, the litigation was settled in principle on July 9, 1980, by a proposed consent decree agreeable to all the parties. (Opp. A3-A8).

Considerable publicity preceded the announcement of the proposed settlement. (Opp. A74-A79). Prior to a hearing on the proposal,[1/] four white Boston police officers moved to intervene to

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1/ Inasmuch as the litigation was styled as a class action, the proposed settlement required notice to the putative class prior to court approval. See Fed. R. Civ. P. 23(e).

protect their purported interest in being promoted to sergeant. Their motions were denied on July 9, 1980, and on September 16, 1980, the District Court approved the consent decree and entered it as an order. (Opp. A9).

The consent decree provided for the establishment of validated promotional procedures for the implementation of the Boston Police Department's pre-existing affirmative action plan and for the establishment of goals and timetables for the promotion of blacks to the position of police sergeant. (Opp. A3-A9). As to the content and administration of the civil service promotional examination itself, the Department of Personnel Administration of the Commonwealth of Massachusetts ("DPA") was to supervise the police department's preparation of an

examination which conformed to the "Uniform Guidelines on Employee Selection Procedures," 29 C.F.R. §§ 1607.1 et seq., or was otherwise demonstrably free of racially discriminatory impact. (Opp. A5-A7). The consent decree further provided for training opportunities for those preparing for the promotional examination with guarantees of equal access to such training for minority candidates. (Opp. A6).

On July 25, 1984, four years after the entry of the consent decree and six years after the commencement of the litigation, the instant petitioners sought to intervene in the District Court.[2/] (Opp. A66-A68). The petitioners at-

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2/ The present petitioner group contains three of the four officers whose motions

(footnote continued)

tempted to distinguish this latest effort to intervene from past, rejected efforts by citing the purported change in the law occasioned by this Court's decision in Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984). The petitioners contended before the District Court that Stotts "held that the remedial authority of the trial court under Title VII is limited to actual victims of defendants (sic) unlawful discrimination" and, accordingly, the District Court "lacked subject matter jurisdiction under that Title to adopt the Consent Decree absent a finding that any of the plaintiffs had been a victim of defendants

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(footnote continued)

to intervene had been rebuffed by the District Court previously, in 1980. (Pet. A7).

(sic) discrimination." (Pet. A13-A14).

The District Court found the petitioners' interpretation of Stotts "far too broad", limited Stotts to its facts, and denied petitioners' application for intervention on May 28, 1985. (Pet. A14-A18).

On December 20, 1985, the Court of Appeals entered judgment affirming the District Court. (Pet. A20). The Court of Appeals noted that petitioners' claim rested upon the assertion that the consent decree is barred by Title VII, as interpreted by this Court in Stotts. The Court of Appeals also noted that it only recently had rejected "this same claim in a similar case with a similar decree imposing similar affirmative action promotion requirements" (Pet. A3) in Deveraux v. Geary, 765 F.2d 268 (1st

Cir. 1985), petition for cert. docketed, September 19, 1985, No. 85-492. Finding no significant distinction between petitioners' case and Deveraux, the Court of Appeals affirmed the order of the District Court. (Pet. A1-A8, A20).

REASONS FOR DENYING THE WRIT

Petitioners assert that this Court's decision in Firefighters Local Union No. 1784 v. Stotts, supra, effected such a significant change in Title VII law that their intervention is justified in this eight year old litigation in order to vacate a six year old consent decree entered by the District Court. This Court, however, has granted certiorari and has heard argument in three other cases this Term which are likely to resolve the precise legal issues raised in the instant

petition. Moreover, this Court currently is considering a petition for a writ of certiorari to the Court of Appeals for the First Circuit in Deveraux v. Geary, 765 F.2d 268 (1st Cir. 1985), a case which that court found to be virtually indistinguishable from the instant case. Accordingly, it is unnecessary to review this case which raises issues which will be addressed in three, and perhaps four, other cases this Term.

I. THE OPINION OF THE COURT OF APPEALS THAT THERE HAS BEEN NO CLEAR CHANGE IN TITLE VII LAW IS CONSISTENT WITH THE OPINIONS OF ALL COURTS OF APPEALS ADDRESSING THE ISSUE, INCLUDING THOSE CASES IN WHICH CERTIORARI HAS BEEN GRANTED THIS TERM.

In Deveraux v. Geary, supra, a case which the Court of Appeals finds indistinguishable from the instant case (Pet. A3), the court said, "Stotts (which dealt

with a different situation) does not make it clear that the challenged consent decree is no longer lawful. The weight of circuit authority construes Stotts as not invalidating such a decree." 765 F.2d at 269. Inasmuch as Stotts does not so clearly constrict a federal court's remedial authority under Title VII, the Court of Appeals was correct in rebuffing petitioners' effort to intervene to vacate the consent decree on those grounds.

Petitioners' only authority purportedly to the contrary is a law review commentary musing about the "potentially sweeping implications" of Stotts or its progeny. (Pet. 5, 19). Seven circuit courts have considered the issue and all seven have declined to find such sweeping implications. Thus, the Court of Appeals

followed the lead of every other circuit court considering a Stotts challenge to an existing consent decree and limited Stotts to its facts. See Deveraux, 765 F.2d at 274; Turner v. Orr, 759 F.2d 817, 823-26 (11th Cir. 1985); EEOC v. Local 638 . . . Local 28 of the Sheet Metal Workers International Association, 753 F.2d 1172, 1186 (2d Cir.), cert. granted, 106 S. Ct. 58 (1985); Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479, 486 (6th Cir.), cert. granted sub nom., Local No. 93, International Association of Firefighters v. City of Cleveland, 106 S.Ct. 59 (1985); Diaz v. American Telephone & Telegraph, 752 F.2d 1356, 1360 n. 5 (9th Cir. 1985); Van Aken v. Young, 750 F.2d 43, 45 (6th Cir. 1984); Wygant v. Jackson Board of Education, 746 F.2d 1152, 1157-58 (6th Cir. 1984),

cert. granted, 105 S.Ct. 2015 (1985); Kromnick v. School District of Philadelphia, 739 F.2d 894, 911 (3d Cir. 1984), cert. denied, 105 S.Ct. 782 (1985); Grann v. City of Madison, 738 F.2d 786, 795 n. 5 (7th Cir), cert. denied, 105 S.Ct. 296 (1984).

Significantly, this Court has granted certiorari and has heard argument in three of the above-cited cases this Term. In Local No. 93, International Association of Firefighters, supra (No. 84-1999; argued on February 25, 1986), a union challenged an affirmative action consent decree entered in settlement of class action litigation, asserting that it penalized innocent non-minority firefighters in contravention of the Fourteenth Amendment. Analyzing the merits of the claim under Title VII, the Sixth

Circuit held that the plan embodied in the consent decree would be valid if it was reasonably related to the objective of remedying prior discrimination, allowed only qualified minorities to be hired or promoted, did not require the discharge and replacement of non-minority workers or create an absolute bar to their advancement, and was temporary in nature and terminated when the underrepresentation of minorities had been corrected. 753 F.2d at 484, citing, Williams v. Vukovich, 720 F.2d 909, 920 (6th Cir. 1983). The consent decree in the instant case meets those same indicia of validity.

Moreover, the Sixth Circuit went on to hold that Stotts was distinguishable as a matter of law, since it involved a court order entered over the objections

of the public employer and outside the scope of the consent decree itself. 753 F.2d at 486. Examining the extent to which Stotts may have defined the remedial relief available under section 706(g) of Title VII, the Sixth Circuit concluded that while Stotts clearly limits the relief which a court may order, it does not forbid an employer from entering into a consent decree. Id. at 487.

Similarly, in Wygant, supra (No. 84-1340; argued on November 6, 1985), the same circuit court upheld a voluntary race-conscious affirmative action plan developed during the collective bargaining process. Stating the majority in Stotts "specifically declined" to decide the validity of such a plan, 746 F.2d at 1158, the court found that it did not

violate the equal protection clause or Title VII even in the absence of direct findings of discrimination.

In Local 638, supra (No. 84-1656; argued on February 25, 1986), the trial court's imposition of an affirmative action plan on a union after trial was affirmed by the Second Circuit. That court rejected the argument "that Stotts eliminates all race-conscious relief except that benefitting specifically identified victims of past discrimination." The court distinguished Stotts on the grounds that its discussion of § 706(g) related only to "make whole" relief ordered by the district court, and did not address the type of prospective relief ordered in Local 638. 753 F.2d at 1185-1186.

Inasmuch as the three cases now under advisement in this Court may have a pro-

found effect on the merits of this and other cases, and inasmuch as this Court has the opportunity to address the legal issues raised by the petition in the three cases now under review, the writ of certiorari should be held in abeyance pending this Court's determination of those cases.

II. THE INSTANT PETITION PRESENTS NO NEW LEGAL ISSUES WHICH THE COURT COULD NOT ADDRESS IN DEVERAUX, SHOULD IT DEEM CERTIORARI TO BE APPROPRIATE IN THAT CASE.

On September 19, 1985, five white police lieutenants asked this Court to issue a writ of certiorari to the Court of Appeals for the First Circuit in Deveraux, supra (No. 85-492). The Deveraux respondents, represented as here by the Massachusetts Attorney General, suggested that this Court's decision on

the petition should be held pending decisions in the three cases which have been heard this Term. Thus far, this Court has not acted on the Deveraux petition. The state respondent suggests that the decision on this petition may be similarly deferred, particularly because the pending Deveraux petition itself provides an additional reason to hold this matter.

Should it become necessary to hear the Deveraux case in addition to the other three cases heard this Term, Deveraux itself will present for the Court's consideration all the legal issues purportedly arising in the instant petition. Accordingly, a writ of certiorari in the instant case at this time would be duplicative and unnecessary.

In Deveraux the Court of Appeals held that Stotts did not invalidate an affir-

mative action consent decree of the type now at bar because 1) the Stotts decree directly conflicted with a bona fide seniority system while the Deveraux decree did not; 2) in Stotts the district court ordered changes in the decree over a party's objections while in Deveraux only the original terms, to which the parties agreed, were enforced; 3) the Stotts decree, being involuntary, fell outside the scope of United Steelworkers of America v. Weber, 443 U.S. 193 (1979) (holding that Title VII does not forbid private employers from voluntarily entering into affirmative action agreements to eliminate manifest racial imbalance), while the Deveraux decree was more like a Weber agreement and; 4) the Stotts defendant had not admitted prior Title VII violations while the Deveraux defendant

did make such admissions. See Deveraux, 765 F.2d 273-74; Pet. A3. In the instant case, the same Court of Appeals correctly stated, "The dispositive legal question before us now is whether this case differs significantly from Deveraux." (Pet. A3).

The Court of Appeals properly found that there is no significant difference between this case and Deveraux. The only distinguishing feature, and the only difference petitioners argue to this Court, is that the Deveraux consent decree contained an admission that the public employer had violated Title VII, while the Boston Police Department made no such concession in this case. (Pet. 6-7, A3). The Court of Appeals correctly dismissed this distinction as insignificant and found that the public employer's admis-

sion of past Title VII violations was not necessary to the result in Deveraux. (Pet. A3). Moreover, the Court of Appeals noted that decisions of other circuits, on which it relied in deciding Deveraux, for the most part did not rely on an employer's admission of Title VII violations. (Pet. A3-A4). Finally, the Court of Appeals stated that it was not aware of any legal theory which would justify allowing Title VII consent decrees to stand or fall depending upon "whether the parties had bothered to negotiate an 'admission' as part of their consensual settlement of the suit. Thus, we find Deveraux dispositive of the present appeal." (Pet. A4).

The Court of Appeals was plainly correct in finding this case indistinguishable from Deveraux. Where this Court is

holding a petition for certiorari in that identical case pending the disposition of three similar cases heard this Term, an additional writ of certiorari in this case would be redundant and would serve no useful purpose.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be held by this Court pending its decisions in Local No. 93, Wygant, and Local 638 and its disposition of the petition in Deveraux.

Respectfully submitted,

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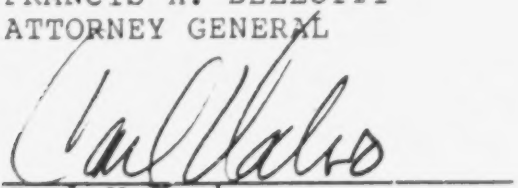

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